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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

WASHINGTON NATIONAL INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

ERNST STURM, JR., Administrator of the Estate of Anne Sturm, Deceased,
Respondent.

No. 526

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

Petitioner, Washington National Insurance Company, prays that a writ of certiorari issue to review a judgment of the Court of Appeals for the Eighth Circuit reversing a judgment of the District Court of the United States for the Eastern District of Missouri.

SUMMARY STATEMENT.

Respondent brought this suit on October 27, 1950, seeking double indemnity under a life insurance policy upon the life of Ernst Sturm, who died December 18, 1942 (R. 1.2), as a result of suicide (R. 1.5). While the policy provides that double indemnity is not payable if death results from suicide, a Missouri statute avoids this provision of the policy in the event the suicide is the result of insanity. A fact issue arose on the question of whether

respondent's insured was insane when he committed suicide.

A jury was waived in the District Court, and after a trial the court made the following finding of fact (R. 1.24).

> "The court finds the facts in the above cause to be as follows: * * *
>
> "8. The plaintiff has not sustained the burden of proof that the insured when he committed suicide was insane * * *."

Accordingly judgment was entered for petitioner and respondent appealed to the Court of Appeals on the ground that the trial court erred in not sustaining his motion for judgment.

The Court of Appeals in its opinion considered the trial court's finding and held:

> "This was in the nature of a legal conclusion rather than a finding of fact. The court did not find that the insured was sane * * *" (R. 14).
>
> "The court did not decide the case on the ground that this testimony was * * * not credible" (R. 15).

Then, instead of remanding the case to the District Court for the absent finding of the fact on the issue of insanity the Court of Appeals reviewed the evidence and found that Sturm was insane at the time of his suicide, and reversed and remanded the cause with directions to enter judgment for the plaintiff.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 13, 1953 (R. 17). Petition for rehearing was filed on November 25, 1953, and overruled on December 15, 1953. The jurisdiction of this court is invoked under Section 125 (1) of Title 28 of the United States Code.

QUESTION PRESENTED.

Where the trial court does not find facts at all on an issue tried without a jury, may the Court of Appeals, without the consent of the parties, try the issue and determine the facts itself, or must it remand the issue for a District Court determination?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The opinion of the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, viz., "In the absence of consent of the parties, may the Court of Appeals make a finding of fact in a jury-waived case where no finding of fact on the issue has yet been made in the trial court?" Otherwise stated the question is, "Do the provisions of the new rules respecting waiver of a jury trial in a law case make of the waiver of the jury a waiver of a District Court trial?" The opinion, in effect, holds these questions must be answered affirmatively and in so doing, it renders nugatory the requirement of Rule 52 that the trial court "shall find the fact specifically."

The importance of this decision upon future litigation is so great as to make review by this Court desirable.

Respectfully submitted,

LON HOCKER,
Attorney for Petitioner.

JONES, HOCKER, GLADNEY & GRAND,
Of Counsel.

BRIEF

In Support of Petition for Writ of Certiorari.

INDEX.

The Index appears preceding the Petition.

OPINION BELOW.

The opinion of the Court of Appeals (R. 5) is not yet reported.

JURISDICTION.

The jurisdictional statement appears in the Petition for the writ (supra, page 2).

SPECIFICATION OF ERROR.

The assigned error that petitioner intends to assert is that the Court of Appeals violated Rule 52 (a), F. R. C. P., in resolving a disputed fact issue involving the credibility of witnesses for the first time on appeal, where the witnesses could not be observed, and without first having submitted the issue to a trial court.

ARGUMENT.

The opinion of the Court of Appeals presents a dilemma, as follows: Either the finding "the plaintiff has not sustained the burden of proof" is a finding of fact or it is not a finding of fact. If it be a finding of fact, the opinion is wrong for failing to give it the "due regard" which Rule 52 (a) requires shall be given to the opportunity of the trial Judge to judge of the credibility of the witnesses. If it be not a finding of fact, then no finding was made on the sanity issue in the trial court, as Rule 52 requires; so the cause should have been remanded for this purpose, and the Appellate Court was wrong in finding the facts itself.

The issue throughout has been "was the insured insane when he committed suicide?" We have felt that the facts on this issue were decided when the trial court held that as to this issue "the plaintiff has not sustained the burden of proof."

The Court of Appeals held otherwise, falling victim, as we regard it, to the old confusion as to the meaning of the phrase "burden of proof" pointed out by Wigmore long ago. Wigmore on Evidence, Second Edition, § 2485, § 2487.

But either the facts were found on this issue or they were not. If they were found the Court of Appeals was in error in holding otherwise, and in avoiding, thereby, the impact of the due regard rule of 52 F. R. C. P. If they were not found, the Court of Appeals was wrong in deciding the issue for the first time on appeal, rather than remanding the cause to the District Court that the finding be made in accordance with 52 F. R. C. P.

We ask the Court to determine whether the statement that the plaintiff has not sustained the burden of proof be truly a finding, and if so to remand the cause to the Court of Appeals with instructions to give to it due regard, and

if not to remand it to the District Court that a finding be made on the issue of insanity in accordance with 52 F. R. C. P.

Respondent may argue: What difference does it make? The Court of Appeals has power to reverse a finding of fact in a jury-waived case under Rule 52. Why waste time remanding to the District Court for findings the Appellate Court could reverse anyway? Why not have the Court of Appeals find the facts in the first place?

The answer to this argument is that the appellant has the right to confront the witnesses in the presence of the fact-trier, to win a decision on credibility, and to come to the Appellate Court armed with the benefit of the *due regard* rule imposed by Rule 52 (a):

> "Due regard shall be given to the opportunity of the trial Judge to judge of the credibility of the witnesses."

The procedure followed by the Court of Appeals in this case vitiates this right. It does so by holding that the finding of fact was not a finding at all, but a conclusion of law (R. 14).

While we disagree with this interpretation of the trial court's holding, still if it is to stand, we insist upon compliance in the trial court with Rule 52: "• • • the trial court shall find the facts specially • • •."

American jurisprudence has been traditionally extremely jealous about the method of trying fact issues. An express provision of the Constitution prohibits appellate review of the determination of a fact by a jury (U. S. Const., Am't VII). The due regard rule was a *caviat* in the spirit of this constitutional provision. It stated no new principle, since any reviewing Judge realizes that a trial court had the opportunity he had not, to observe the de-

meanor of the witnesses; and it is unenforceable because it is not possible to look into the appellate Judge's mind to see whether he has really given heed to such a rule. Yet there is the rule. The mere fact that such an obvious and unenforceable proposition was written into the federal rules shows the concern of the rule makers to preserve, in full effectiveness, the right of confrontation. The right of a litigant to expose a witness is not alone to do so in ways which show up in the written transcript, but also to do so in ways which are apparent only to the trier of the fact observing the testimony being given. There are cases, in the experience of each of us, where the demeanor of the witnesses was more cogent than their words.

The Court of Appeals remarked that the defendant below put on no evidence on the insanity issue (R. 14). This is true, and yet the defendant required a trial. It was never contended that the facts presented failed to make out a claim for relief (although the Court of Appeals treats the finding of fact as a legal decision of this sort); yet the defendant required a trial. Time and money could doubtless have been saved by stipulating on the facts and letting the court decide the case on the stipulation, or, for that matter, on depositions; yet the defendant required a trial. Why? Simply to permit the court to judge of the credibility of the witnesses. This substantial right which the defendant did not waive below has been denied it by the Court of Appeals' opinion.

This denial appears in the opinion itself; so it may be seized upon as a precedent on the basis of which to deny other litigants the right to confront witnesses before the piercing eye of a trial Judge. ***Indeed, the effect may be to warn litigants not to waive a jury trial lest in so doing they waive the right to confront witnesses.***

Appellee *did* waive a jury trial. ***It did not waive a District Court trial.*** One of the requirements of a non-

jury District Court trial is that there be findings of fact. Rule 52 (a) provides:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially . . .".

It may be said that since this Court has power to set aside fact findings, it might as well make them in the first place. This is not the law. In Jones v. Waterman S. S. Corp., 155 F. 2d 992, 997, the 3rd Circuit Court of Appeals held:

> "The Court below in the case at bar made no findings of fact or conclusions of law as to Reading's negligence, if any, since it relied on The Federal No. 2, supra. It is suggested by counsel for Jones that this Court 'as in an action in admiralty' may make findings of fact and conclusions of law. We may not do this. The suit at bar is not in admiralty though Jones' rights against Waterman are governed by the general maritime law. It is a civil suit and is to be conducted in the court below according to the Rules of Civil Procedure, 28 U. S. C. A., following Sec. 723-c. Since it was tried to the court and not to a jury, findings of fact and conclusions of law must be made by the court below as required by Rule 52."

The only occasion when a Court of Appeals can ignore the requirement of the rule that the lower court decide the facts is where consent is given. Thus in Aetna v. Meyn, 134 F. 2d 246, 249 [1], the Court held:

> "With respect to the assignment of error last mentioned, it is true that there was a formal failure on the part of the trial court to make findings of fact. . . . *The parties request a decision here upon the merits.* In the circumstances stated, we think we are at liberty to decide the case on its merits without remand for a mere formal compliance with the rules."

Appellee does not, and has never, requested this Court to decide the facts, and does not waive compliance with 52 (a).

This is not a merely formal or technical matter, for this Court is supposed to give "**due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses**" (Rule 52-a).

The opinion in this appeal gets around this requirement by saying, p. 11, "**The Court did not decide the case on the ground that this testimony** was incompetent or that it **was not credible . . .**"

Appellee has a right to come to the Appellate Court with the benefit of the due regard rule respecting trial court findings (Rule 52-a). The opinion deprives appellee of this right, **whether this be a finding of fact or not.** For if this is a finding of fact, the Court has not given it the weight which Rule 52 requires, and if it is not a finding of fact, then the Court of Appeals has exceeded its jurisdiction by finding the fact in the first instance instead of remanding the cause for another trial in which the Court can make its findings more specific.

Certiorari should be granted so that the mandate of the Court of Appeals may be modified to require a trial of the insanity issue in the District Court with findings required by Rule 52 (a), F. R. C. P.

Respectfully submitted,

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